there at Salen there is no daybreak at three o'clock when the sun rises at five o'clock.

Now, I said at the outset that it did not occur to me that I could usefully detain you long or profitably in this case, which is eminently a case for your judgment and consideration. If you think the yacht was lighted, although the lights were put up only at that late hour—if you think that the captain although there for the purpose of attending to his duty and having nothing else that he could attend to—not reposing or amusing himself, and apparently acting in conformity with the character he had gained from his employers during five years of steady service—if you think it according to the evidence that he was negligent or reckless upon this occasion, you will say so. If, on the other hand, you think that it is not established, and that the accident must be otherwise accounted for, and that you are not prepared to impute crime to him, your proper course will be to find that he is not guilty.

Verdict—Not guilty.

The case against Tyre was abandoned.

Counsel for H. M. Advocate—Lord Advocate Macdonald, Q.C.—Wallace, A.-D.

Counsel for Drever—Jameson—Dickson—Salvesen.

Counsel for Tyre — Ure. Agents — Boyd, Jameson, & Kelly, W.S.

Tuesday, November 3.

FIRST DIVISION.

CARRON COMPANY, PETITIONERS.

Process—Expenses—Merchant Shipping Amendment Act 1854 (17 *and* 18 *Vict. c.* 104), *sec.* 514 *—Merchant Shipping Amendment Act* 1862 (25 *and* 26 *Vict. c.* 63), *sec.* 54.

Petitioners for limitation of liability under the 54th section of the Merchant Shipping Amendment Act 1862, having been found liable to the claimants in expenses, *held* that these did not include the expense of a competition among the claimants with regard to their rights in the fund consigned by the petitioners.

This was a petition presented by the Carron Company, owners of the ss. "Margaret," for limitation of their liability for damage caused by a collision with the ss. "Clan Sinclair," under the 54th section of the Merchant Shipping Amendment Act 1862 and the 514th section of the Merchant Shipping Amendment Act 1854.

The Court on 13th December 1884 appointed the petitioners to consign in bank, to await the orders of Court, the sum of £3087, being £8 per ton on 385·87 tons, the gross tonnage of the vessel.

Claims having been lodged for Messrs Cayzer, Irvine & Company, the owners of the "Clan Sinclair," for the master and seamen of the "Margaret," and for various cargo-owners, which claims amounted in the aggregate to more than the amount consigned, the Court on 19th March 1885, of consent, remitted to Mr Richards, average adjuster, to consider the claims, "and to assess the amounts due to the respective claimants thereunder."

Mr Richards having lodged his report, the Court on 18th July 1885 pronounced this interlocutor—"Recal all arrestments used in respect of said collision: Rank and prefer the whole claimants *pari passu* on the consigned funds for the respective amounts of their claims as the same have been assessed by the reporter: Appoint the claimants Cayzer, Irvine, & Company to lodge in process a scheme of division of said fund, showing the amount due to each claimant in respect of the foregoing finding, ranking, and preference: Find the petitioners Carron Company liable in expenses to the whole claimants; remit the accounts of said expenses to the Auditor to tax and to report."

The Auditor in taxing the claimants' accounts of expenses, reserved for the determination of the Court "the question of the liability of the petitioners for the expenses incurred under the remit to Mr William Richards, London, 'to consider the claims lodged for' the claimants named, 'and to assess the amounts due to the respective claimants.'"

"*Note.*—By the interlocutor of 18th July last the Court 'Find the petitioners Carron Company liable in expenses to the whole claimants: Remit the accounts of said expenses to the Auditor to tax and to report.' Two accounts of expenses have been given in, viz., account for Cayzer, Irvine, & Company (that now reported on), and the other for the remaining claimants who have appeared. Both sets of claimants maintain that under this interlocutor they are entitled to the whole expenses incurred by them under the petition. I am humbly of opinion that this contention is not well founded, and that while the whole claimants are entitled to the expense of stating their claims, attending before the Court, obtaining the remit to Mr Richards, and giving effect to his award or report, they are not entitled as in a question with the petitioners to the expenses incurred by them before Mr Richards in adjusting the various claims and assessing the amounts due to the claimants respectively. The proceedings before Mr Richards were not proceedings between the claimants and petitioners, but were truly competitive. The result has been that while the whole claimants other than Cayzer, Irvine, & Company have been successful in supporting their claims with comparatively trifling abatement (£57, 14s. 11d. on the whole amount), the claim of Cayzer, Irvine, & Company has been disallowed to the extent of £627, 0s. 10d. The petitioners stated no objections to the claims before Mr Richards, and have not in any way contributed to or increased the expense of adjustment."

When the petitioners moved for approval of the Auditor's report, the claimants objected that the finding for expenses in the interlocutor of 18th July 1885 meant the whole expenses properly incurred in the cause. [LORD PRESIDENT—The consigners here stand in much the same position as the raisers of a multiplepoinding, with this exception, that as it is their delinquency which is the cause of the consignation they are liable for the expenses necessarily involved, which include the expense of the claims, but nothing further.] The petitioners ought then to have protected themselves by getting the interlocutor so limited, as was done in the case of *Burrell* v. *Simpson & Company*, November 24, 1876, 4 R. 177.

At advising—

Lord President—I agree with the Auditor in regard to this matter, and do not think that we are precluded by the finding in our interlocutor of 18th July 1885 from giving effect to that view.

The party who presents a petition of this kind is bound to pay expenses, and that on this obvious ground, that it is because of his fault in causing the collision that the application is rendered necessary. But the expenses involved would not amount to more than the expense of stating the claims if those claims were unobjectionable, and the proceedings would come to a conclusion without any reference to an average adjuster.

The limitation of the petitioners' liability has the effect generally, and certainly has the effect here, of limiting the amount of the fund available for payment of the claims. In fact, it converts the process, after the amount of the fund has been ascertained, into a process of competition as in bankruptcy. The claimants in claiming a sum which in the aggregate exceeds the amount of this fund are in competition with each other when they come before the average adjuster.

I think the just rule is, that whatever expenses have been incurred by the claimants in the competition *inter se* should not be borne by the petitioner.

Lord Mure—It is evident the petitioners are liable in some part of these expenses, and what I wanted to know was whether these expenses before Mr Richards were incurred in consequence of something that the Carron Company had done. It was explained that this was not so, and I think therefore it would be unfair that they should pay the expense of what was a competition between the parties. I agree with what your Lordship observed in the course of the argument, that this process is just like a multiplepoinding, in which the petitioner takes no part in the dispute.

Lords Shand and Adam concurred.

The Court approved of the Auditor's reports, and found the claimants not entitled as against the petitioners to the expenses incurred in discussing their claims before the average adjuster.

Counsel for Petitioners—Dickson. Agents—John Clerk Brodie & Sons, W.S.

Counsel for Claimants—H. Johnston—Jameson. Agents—Hagart & Burn Murdoch, W.S., and J. & J. Ross, W.S.

Tuesday, November 3.

SECOND DIVISION.

WATSON AND OTHERS *v.* BEST'S TRUSTEES AND OTHERS.

Faculty and Powers—Marriage-Contract—Power of Appointment — Invalid Appointment — Residuary Appointment.

A wife who had under her marriage-contract power to appoint her own share of the marriage-contract property among the children of the marriage, who were to have equal shares in the event of her making no appointment, appointed part of that property in certain proportions among the children of the marriage, omitting one child to whom she made no appointment, but who would have taken a share under the provisions of the marriage-contract. The deed contained also an invalid appointment of certain legacies to persons who were strangers to the power, and a residuary clause appointing the residue equally among the children to whom she had already made particular appointments. *Held* (*dub.* Lord Craighill) that the sums appointed to strangers to the power fell under the residuary clause of the deed of appointment.

Thomas Best and Mrs Dunlop or Best were married in 1831. An antenuptial contract was entered into whereby Mrs Best conveyed to the marriage-contract trustees the whole property belonging to her for certain trust purposes; among these were, that the trustees should hold her property for behoof of herself and her husband and the survivor in liferent, and after the death of the survivor of the spouses pay over the fee to the children procreated of the marriage in such proportions as should be appointed by a writing executed jointly by the spouses, or by Mrs Best if she survived her husband, and failing any appointment then to pay to the children in equal shares.

On 7th December 1859 Mr and Mrs Best executed a joint deed of appointment, by which they appointed the estate above mentioned among the children of the marriage then alive, in certain proportions. This deed contained a power either to the spouses jointly or to Mrs Best, if she survived Mr Best, to alter or revoke the same, and the division thereby made, but under the declaration that in so far as not altered the same should be held as a valid deed of appointment and division.

There were five children of the marriage.

Thomas Best predeceased his wife.

In July 1875, after Mr Best's death, Mrs Best executed a deed of appointment and division by which she revoked the deed of 1859 and made a new appointment of her estate in certain proportions. In particular, she, with his own consent, directed that only one-half of the amount apportioned to her son William James Best should be payable to him, and that the other half should be divided equally between his two children, he having the liferent of that half. By this deed she gave a sum of £100 to John Paton Watson, husband of one of her daughters.

In 1880 Mrs Best executed another deed of appointment and division, which bore to revoke the joint deed of 1859 but did not bear to revoke the deed of 1875.

By this deed she appointed and divided her estate as follows, viz.—(1) £3000 equally between her grandchildren Thomas Alexander Vans Best and Louisa Vans Best, the children of her deceased son Alexander Vans Best; (2) £1000 equally between the two children of William James Best, the income being payable to him during his life; (3) £200 equally between Eric Grant Matheson and Ailsie Matheson, children of Mrs Louisa Cecilia Caroline Matheson or Best, widow of Alexander Vans Best; £100 to William Pirrie, M.D.; £50 to Jane Duncan, an